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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

MARCO LARUE,

Defendant and Appellant.

C084929

(Super. Ct. No. 16FE019233)

A jury found defendant Marco Larue guilty of two counts of second degree robbery. (Pen. Code, § 211.)¹ It was also alleged that defendant had a prior serious felony conviction (§ 667, subd. (a)(1)) and five times previously served a prison term (§ 667.5, subd. (b)). Defendant admitted the convictions that formed the basis for these allegations. Before he did so, two of the underlying felony convictions attached to the prior prison term allegations were reduced to misdemeanors under Proposition 47, the Safe Neighborhoods and Schools Act.

¹ Undesignated statutory references are to the Penal Code.

The trial court sentenced defendant to a total term of 16 years in prison: the upper term of five years for count one; one year for count two (one-third the middle term of three years); five years for the section 667, subdivision (a)(1) enhancement; and one year for each section 667.5, subdivision (b) enhancement. The trial court imposed but stayed the prior prison term enhancement based on case No. 13F07250 because “[t]here’s a question mark as to whether or not that is appropriately sentenced as a prior conviction.”

On appeal, defendant argues: (1) the trial court abused its discretion in admitting evidence of a prior incident at a department store; (2) the trial court erred by instructing that petty theft was a lesser included offense of attempted robbery rather than robbery; (3) the trial court erred in failing to protect Juror No. 9 from the other jurors when she asked to be removed from the jury; (4) the trial court erred in failing to advise him of his rights to remain silent and to confront adverse witnesses when he admitted his priors; and (5) two prior prison term enhancements must be stricken because the underlying felony convictions attached to the enhancements had already been reduced to misdemeanors. Of the contentions raised in the initial briefing, only the issue relating to the two prior prison term enhancements has merit. The parties also submitted supplemental briefing on the applicability of recent amendments to sections 667 and 1385, permitting the trial court to exercise its discretion under section 1385 to strike or dismiss five-year prior serious felony enhancements under section 667, subdivision (a)(1). The parties agree that the amendment applies to these proceedings. We will remand for resentencing, but otherwise affirm the judgment.

I. BACKGROUND

A. 2016 Grocery Store Robbery

On October 4, 2016, David and Michael were working as loss prevention agents at a grocery store. They noticed defendant carrying a backpack in his hand in the liquor aisle. They both saw defendant put a bottle of liquor into his backpack. They also heard what sounded like glass bottles inside the backpack.

The agents eventually approached defendant, told him they were security for the store, and asked him to remove the bottles from his backpack. The store puts security caps on all liquor bottles. The caps are removed at the register after the customer purchases the bottle. Defendant removed one bottle from his bag, but it did not have a security cap on it. Michael placed this bottle on the shelf. There were two other bottles in defendant's backpack that had a security cap on them, but he refused to take them out and claimed they were his bottles that he got from another store. Michael attempted to grab the backpack. Defendant was holding a screwdriver. The agents told defendant, "the screwdriver is like a weapon . . . you need to drop it." Defendant said the screwdriver was not a weapon and handed it to Michael. Defendant then said, "you want to see a real weapon?" or "if I want to pull a weapon, I'll pull this." He pulled a meat thermometer out of his backpack. Michael laughed and asked defendant what he was doing. Defendant took the black sleeve off the thermometer and put the part that displays the temperature inside his fist and the pointed end that inserts into the meat facing out. The pointed end appeared sharp enough to puncture skin.

Michael and David backed away, but there was not a lot of room to do so. David was still within close range of defendant.

David was concerned for his safety and backed up to avoid being stabbed. David was not sure of defendant's intentions when he first pulled out the meat thermometer, but he did not appear to be joking. David thought the backpack was on the ground at this point, but it was still within defendant's reach and still had two bottles of liquor inside. David saw defendant pick up the backpack and proceed to leave the store.

When Michael initially attempted to take defendant's backpack, he saw defendant take a fighting stance. David told defendant to put the meat thermometer away. He did not. Michael saw defendant take a step toward David. Michael tried to grab defendant's arms to restrain him. When Michael failed, he put his right arm underneath defendant's

chin so that defendant was looking at the ceiling. Then, Michael used his left hand to knock the meat thermometer out of defendant's hand and onto the floor.

Michael testified that, at this point, the backpack was on the ground. Michael thought that after defendant pulled out the meat thermometer, Michael had removed the backpack and handed it to David, who placed it on the ground.

Two sheriff's deputies who reviewed the store's surveillance video with the loss prevention agents testified regarding what the video showed. They testified that defendant took at least one bottle of liquor and placed it into his backpack. One deputy testified that defendant appeared to use the meat thermometer to keep the loss prevention agents away from him. He held it out in front of him and waved it back and forth a little bit. The agents backed away. The parties stipulated, in effect, that their efforts to obtain a copy of the surveillance video were unsuccessful.

B. 2013 Department Store Incident

A loss prevention officer for a department store testified that on September 24, 2013, he saw defendant enter the shoe department and begin looking for shoes. Defendant removed a pair of shoes from their box, pulled a pair of wire cutters out of his pocket, and cut the security device off of the shoes. He stuffed the shoes into his waistband and left the store without paying. Once he was outside the store, the officer asked defendant to go back inside and speak to him about the shoes. Defendant said he did not take anything, but if the officer touched him, he would "fuck [him] up." Defendant reached into his pocket and pulled out the wire cutters. The officer stepped away and told defendant he was going to call the police. Defendant threw the shoes on the ground and left.

II. DISCUSSION

A. Prior Acts Evidence

Evidence Code section 1101, subdivision (a) generally prohibits the admission of evidence of a prior criminal act against a criminal defendant "when offered to prove his

or her conduct on a specified occasion.” Subdivision (b) of that section, however, provides that such evidence is admissible “when relevant to prove some fact (such as motive, . . . intent, . . . plan, . . . identity . . .) other than his or her disposition to commit such an act.” Nonetheless, “an accused may still urge that [Evidence Code] section 352 should bar it from consideration.” (*People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 406 (*Bryant*).)

“Evidence of *intent* is admissible to prove that, if the defendant committed the act alleged, he or she did so with the intent that comprises an element of the charged offense. . . . For example, in a prosecution for shoplifting in which it was conceded or assumed that the defendant left the store without paying for certain merchandise, the defendant’s uncharged similar acts of theft might be admitted to demonstrate that he or she did not inadvertently neglect to pay for the merchandise, but rather harbored the intent to steal it.” (*People v. Ewoldt* (1994) 7 Cal.4th 380, 394, fn. 2.)

“The least degree of similarity (between the uncharged act and the charged offense) is required in order to prove intent.” (*People v. Ewoldt, supra*, 7 Cal.4th at p. 402.) “The greatest degree of similarity is required for evidence of uncharged misconduct to be relevant to prove identity.” (*Id.* at p. 403.)

1. Trial Court Proceedings

Prior to trial, the prosecution filed a motion in limine to introduce evidence of the 2013 incident at the department store and a 2012 incident at another supermarket to prove defendant’s motive, scheme and intent under Evidence Code section 1101, subdivision (b). The prosecution explained defendant had pled not guilty, thereby putting all the elements of the charged offenses at issue for the purposes of deciding admissibility under Evidence Code section 1101, subdivision (b), and defendant had done nothing to eliminate the issues by stipulation or otherwise. (See *People v. Daniels* (1991) 52 Cal.3d 815, 857-858 [“[I]t appears that defendant’s plea does put the elements of the crime in issue for the purpose of deciding the admissibility of evidence under Evidence Code

section 1101, unless the defendant has taken some action to narrow the prosecution's burden of proof" (fns. omitted)].)

During the 2012 incident, a loss prevention agent saw defendant conceal a pair of socks and then a bottle of lotion on his person before leaving the store without paying. The agent confronted defendant outside the store. Defendant began to clench his fists before he was handcuffed.

At the hearing on the prosecution's motion, defense counsel objected to the admission of the prior acts evidence under Evidence Code section 352. She stated, "this isn't an issue of identity. And [the prosecutor] laid out in his motion correctly that when it's an issue of intent, it requires the least amount of things that we're looking for. . . . [B]ut it's very, very prejudicial in that it's so similar. It's so similar that it's very prejudicial and it's very problematic that the jury might think, oh, well, he did it before so he must have done it this time." Defense counsel also argued the 2012 conviction was not similar enough to be admissible because beginning to clench fists was not a use of force. The trial court agreed with this latter argument and excluded the evidence of the 2012 incident: "[W]hat's interesting about these two incidents is that really the least violent of the two would normally be a factor that I would consider in admitting because it is less prejudicial because there is no weapon involved. [¶] But in this incident I do agree with [defense counsel]. I think it is dissimilar. And I think that it's dissimilar . . . such that it should not be admitted even though the conduct is less than in the conduct in the September 24th incident where [defendant] is alleged to have pulled out a pair of sharp wire cutters. And so I find that the 2012 incident lacks similarity such that I would allow that to be placed in front of the jury." The court then proceeded to analyze the 2013 incident: "But I do find that the September 24th incident bears a striking resemblance to what we have in this case in so far as the contact between loss prevention officers and [defendant,] and [defendant] resorting to the use of a weapon to get away from loss prevention officers. I understand my obligation under Evidence Code section

352. I do find that this evidence is substantially more probative than it is prejudicial. It does bear upon two issues: intent and motive.” The court said it did not believe the jury would misuse the evidence because the court would instruct the jury on its limited use. The court ultimately instructed the jurors they could consider evidence of the 2013 incident only if the People proved defendant had committed the offense by a preponderance of the evidence, and then only for the limited purpose of deciding whether defendant “acted with the intent to permanently deprive [the store] of property in this case or had a motive to commit the offenses charged in this case.”

2. *Evidence Code Section 1101*

Defendant asserts the trial court abused its discretion in admitting evidence of the 2013 incident under Evidence Code section 1101, subdivision (b), because his intent was not disputed. The People argue defendant forfeited this argument by failing to raise it in the trial court. We agree with the People. (*Bryant, supra*, 60 Cal.4th at p. 408; *People v. Goldman* (2014) 225 Cal.App.4th 950, 960.) Defense counsel’s argument essentially conceded that intent was at issue (rather than identity) and that the evidence was admissible under Evidence Code section 1101, subdivision (b), but argued the evidence should nonetheless be excluded under Evidence Code section 352. This is the argument we will address on appeal.

3. *Evidence Code Section 352*

Even where prior acts evidence is not excludable under Evidence Code section 1101, “to be admissible such evidence ‘must not contravene other policies limiting admission, such as those contained in Evidence Code section 352.’ ” (*People v. Ewoldt, supra*, 7 Cal.4th at p. 404.) “Under Evidence Code section 352, the probative value of a defendant’s prior acts must not be substantially outweighed by the probability that its admission would create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.” (*People v. Davis* (2009) 46 Cal.4th 539, 602.) We review the trial court’s ruling for abuse of discretion. (*Ibid.*) Defendant accuses the trial court of

simply deciding to give the prosecution half of what it asked for rather than conducting a proper balancing of factors under Evidence Code section 352. The record does not support this assertion. While there was some discussion of the relative prejudice associated with the two incidents when the trial court decided to exclude the 2012 incident, the trial court balanced the Evidence Code section 352 considerations in determining the admissibility of the 2013 incident. We also reject defendant's secondary claims that the evidence required an undue amount of trial time, was unduly confusing, and possessed only minimal relevance that was outweighed by extremely high prejudice. While the testimony of the witnesses to the 2016 offense was also relevant to defendant's intent, under these circumstances we cannot conclude the trial court abused its discretion in determining the probative value of the 2013 evidence on this point was not substantially outweighed by the dangers of undue prejudice.

B. Jury Instructions

The court told the jury that “[a]ttempted robbery is a lesser crime of robbery of the second degree. Petty theft is a lesser crime of attempted robbery. It is up to you to decide the order in which you consider each crime and the relevant evidence, but I can accept a verdict of guilty of the lesser crime only if you have found the defendant not guilty of the corresponding greater crime.”

The parties agree the trial court erred by instructing that petty theft was a lesser included offense of attempted robbery rather than robbery. “Theft is a necessarily included offense of robbery.” (*People v. Ledesma* (2006) 39 Cal.4th 641, 715.) A robbery “is essentially a theft with two aggravating factors, that is, a taking (1) from victim’s person or immediate presence, and (2) accomplished by the use of force or fear.” (*Miller v. Superior Court* (2004) 115 Cal.App.4th 216, 221.)

Defendant argues that “[h]ad the jury not been improperly instructed that it had to consider and reject both robbery and attempted robbery prior to considering petty theft, there is a ‘reasonable chance’ that it would have selected the lesser.” In other words,

defendant contends that being instructed that it would have to find him not guilty of attempted robbery in order to convict him of petty theft added a prejudicial hurdle to the jury's analysis. This argument would have more persuasive power if the jury had returned a verdict of guilty as to attempted robbery only. The jury's actual verdict made clear that it found the elements of robbery beyond a reasonable doubt. Where the trial court fails to instruct on the lesser offense at all, "in assessing prejudice, it does not matter that the jury chose to convict the defendant of the greater offense over acquittal or that the defendant was convicted of the greater offense on sufficient evidence." (*People v. Racy* (2007) 148 Cal.App.4th 1327, 1335.) This is because "the very purpose of the rule is to allow the jurors to convict of *either* the greater or the lesser offense where the evidence might support either. That the jury chose the greater over acquittal, and that the evidence technically permits conviction of the greater, does not resolve the question whether, 'after an examination of the entire cause, including the evidence' [citation], it appears reasonably probable the jury would nonetheless have elected the lesser if given that choice." (*People v. Breverman* (1998) 19 Cal.4th 142, 178, fn. 25.) Here, the jury was instructed on petty theft and was not forced to choose between convicting defendant of robbery or acquitting him. Rather, the jury was presented with what was erroneously described as a progression of offenses from petty theft to attempted robbery to robbery, and it chose the harshest one. Under these circumstances, we conclude the trial court's erroneous description of the relationship between the offenses was harmless.

C. *Juror No. 9*

1. *Trial Court Proceedings*

After less than a day of deliberations, the jury sent a note declaring they were at an impasse. Outside the presence of the jury, the court indicated that it would give the jury a supplemental instruction taken from our decision in *People v. Moore* (2002) 96 Cal.App.4th 1105. Defense counsel objected to the giving of the instruction: "I believe they have been deliberating as long as the evidence that they received. So I don't see a

basis. At this point[,] I think any instruction pressures them into reaching a verdict that they may not be comfortable with.” The court explained that “this jury has requested absolutely nothing. They have not asked a question. They have not asked for read back. They have not asked for any kind of clarification. [¶] . . . [U]nfortunately we were not able to be in session on Monday and Tuesday. . . . And so I think that the passage of time may be a factor here in causing this jury not to be able to come to a decision. But, in any event, the Court is satisfied that it would be appropriate under these circumstances to give what is an approved instruction to these jurors.” The court did so. The jury resumed deliberations at 1:35 p.m. and requested read back of the testimony of three witnesses at 3 p.m. The following morning, Juror No. 9 delivered a note to the bailiff requesting to be excused from the jury, explaining, “I feel that I am being pressured, even ganged up upon, to vote a certain way.” Outside the presence of the other jurors, the court questioned Juror No. 9 about her willingness to deliberate further, and questioned the foreperson about the potential usefulness of further deliberations. Defense counsel interposed no objections. Deliberations continued and the jury reached its verdict.

2. *Forfeiture*

On appeal, defendant argues the trial court erred in failing to protect Juror No. 9 from the other jurors when she asked to be removed from the jury. Defendant’s claim is forfeited by his failure to object in the trial court. (*People v. Russell* (2010) 50 Cal.4th 1228, 1250 [“[D]efendant’s claim that the court’s questions of Juror No. 8 constituted reversible error because they were improper, intrusive, and coercive is forfeited because defendant failed to object”]; *People v. Cain* (1995) 10 Cal.4th 1, 55 [defendant waived claim that trial court’s instructions to the reconvened jury in effect directed the jury to return a verdict of first degree murder by failing to object].) Defendant claims his objection to the giving of the supplemental instruction to the deadlocked jury preserved this argument for appeal because it was an objection to the same error—ordering the jury to continue deliberating. Despite this framing of his argument, his opening brief actually

contends the court coerced Juror No. 9 to change her vote by refusing to dismiss her, and that the court's comments to Juror No. 9 and the foreman were "a clear directive to Juror 9 to change and to the foreman to effectuate Juror 9 to change." Defense counsel's objection to the supplemental instruction did not fairly alert the trial court to defendant's concerns regarding the trial court's handling of Juror No. 9's request. Additionally, in overruling the initial objection to the supplemental instruction and ordering the jury to continue deliberating, the trial court noted a number of factors that no longer applied by the time it spoke to Juror No. 9. Defendant's claims related to this exchange are forfeited.

D. Defendant's Admission of His Priors

1. Trial Court Proceedings

After the jury reached its verdict, but before it was read, defense counsel indicated that she "had a significant amount of time to discuss [the] issue" with defendant and he wanted to admit his priors.

The court confirmed this with defendant:

"THE COURT: All right. Is that what you desire to do, [defendant], is go ahead and admit the priors that the People have alleged in this information?

"THE DEFENDANT: Yes.

"THE COURT: You understand that you have a right to a jury trial to decide whether or not [the prosecutor] can prove beyond a reasonable doubt that you have been convicted of these prior offenses? [¶] Do you understand that?

"THE DEFENDANT: Yes.

"THE COURT: That would be the same jury that is and has been deliberating on this case. [¶] Do you understand that?

"THE DEFENDANT: Yes.

"THE COURT: And by admitting these offenses you are waiving your right to a trial by jury on these convictions. [¶] Do you understand that?

“THE DEFENDANT: Yes.

“THE COURT: Do you have any questions for the Court in that regard?

“THE DEFENDANT: No.”

The court explained the consequences of admitting the priors: “[T]he first prior conviction is alleged as a serious or violent felony. [¶] Okay. So the way the People have pled it, they didn’t plead it actually as a strike. They pled it as a five-year prior. [¶] The next convictions we’re gonna talk about are alleged as one year priors. [¶] Meaning that when you are—if you are sentenced in this case and when you are sentenced, you would be sentenced to an additional year on each prior conviction. [¶] Other than the first one, which is a five-year prior—

“THE DEFENDANT: Could I ask you a question?

“THE COURT: Ask your attorney first.”

Back on the record, the trial court added: “We can easily do a trial on the priors. It’s not an issue before the Court.

“THE DEFENDANT: I’m baffled, and you got to excuse me. I apologize.

“THE COURT: Okay.

“THE DEFENDANT: This is hard for me to grab onto right now.

“THE COURT: I—

“THE DEFENDANT: What I did and being convicted of is two totally different things.

“THE COURT: And I understand that’s been your information from day one in this case. [¶] So I just need to know, you’ve already indicated that you don’t want the jury to make this decision as to your prior convictions. [¶] You’ve indicated that you just want to admit them and so we just have to go down the road and you either admit or deny. [¶] If you deny these prior convictions, then we’ll do a trial on it. We can do a Court trial on it or we can have a jury trial on it or you can admit. Those are your three options and [defense counsel] indicated you do.

“THE DEFENDANT: Yes, I plead no contest to that.

“THE COURT: Okay. So let[']s start with the top. [¶] It’s alleged on June 13th, 1990[,] in the County of San Francisco you were convicted of the crime of second degree robbery in violation of Section 122—212.5 of the Penal Code, that is a serious felony. [¶] Do you admit or deny that prior conviction?

“THE DEFENDANT: I admit.

“THE COURT: Prior conviction number two indicates that on December 2nd, 1997, in the Superior Court, County of Sacramento, you were convicted of the crime of driving a stolen vehicle in violation of Section 120851 [*sic*] of the Vehicle Code and that you served a separate term in state prison and that you did not remain free of prison custody or you committed an offense resulting in another felony conviction during a period of five years subsequent to that term. [¶] Do you admit or deny that prior conviction?

“THE DEFENDANT: I admit the conviction.

“THE COURT: Prior conviction number three indicates that on December 12th, [2002], in the Superior Court, County of Sacramento you were convicted of the crime of possessing stolen property in violation of Section 496 of the Penal Code. [¶] That you served a separate term in state prison and that you did not remain free of prison custody or you committed an offense resulting in a felony conviction during a period of five years subsequent to the conclusion of that term. [¶] Do you admit or deny that prior conviction?

“THE DEFENDANT: Excuse me. You—from the vehicle theft to the possession of stolen property did I—you asked if I committed a felony?

“THE COURT: I’m just indicating that’s what the prior conviction is. [¶] If you have a question, you can ask your attorney.

“THE DEFENDANT: I heard wrong. [¶] Can you repeat that, please?

“THE COURT: Prior conviction number three, on December 12th, 2002, in the Superior Court, County of Sacramento, you were convicted of the crime of possessing stolen property in violation of Section 496 of the Penal Code. [¶] That you served a separate term in state prison for that offense and you did not remain free of prison custody or you committed an offense resulting in a felony conviction during a period of five years after the conclusion of that term. [¶] Do you admit or deny that prior conviction?

“THE DEFENDANT: Okay. I—I understand that. Yeah, I admit that. I admit.

“THE COURT: Okay. Prior conviction number four, on April 26th, 2010, in the Superior Court, County of Sacramento, you were convicted of the crime of possessing a dangerous weapon in violation of Section 12020[, subdivision (a)] of the Penal Code. [¶] That you served a separate term in state prison for that offense and that you did not remain free of prison custody or you committed an offense resulting in a felony conviction during a period of five years after the conclusion of that term. [¶] Do you admit or deny that prior conviction?

“THE DEFENDANT: I admit it.

“THE COURT: Prior conviction number five alleged that on June 16th, 2014[,] in the Superior [C]ourt, County of Sacramento, you were convicted of the crime of petty theft with priors in violation of Section 666 of the Penal Code. [¶] That you did serve a separate term in state prison for that offense and that you did not remain free of prison custody or you committed an offense resulting in a felony conviction during a period of five years after that term. [¶] Do you admit or deny that prior conviction?

“THE DEFENDANT: Now, seeing that this one was cleaned up, is this really what it is?

“THE COURT: We—that is a question that the Supreme Court has in front of it at this time. [¶] I can tell you that if you get convicted of a felony in this case, it is very

doubtful that I'm going to impose this prior constriction on you. [¶] Do you admit or deny that prior conviction?

“THE DEFENDANT: I admit.

“THE COURT: Okay. Prior conviction number six, on May 25th, 2016, in the Superior Court of the County of Sacramento, you were convicted of the crime of violating a Court Order in violation of Section 166[, subdivision (c)(4)] of the Penal Code and that you served a separate term in state prison for that offense and that you did not remain free of prison custody or you committed an offense resulting in a felony conviction during a period of five years after the conclusion of that term. [¶] Do you admit or deny that prior conviction?

“THE DEFENDANT: I admit.

“THE COURT: All right. I do find that the defendant knowingly and intelligently and voluntarily waived his trial to a prior before this jury and has entered admissions as to each and every prior conviction.”

2. *Whether Waivers Were Voluntary and Intelligent*

Before a trial court may accept a defendant's plea of guilty to an offense, the court is required to advise the defendant, and obtain the defendant's voluntary and intelligent waivers, of his or her rights to be tried by jury, to remain silent, and to confront adverse witnesses. This must be done on the record. (*Boykin v. Alabama* (1969) 395 U.S. 238, 242-244; *In re Tahl* (1969) 1 Cal.3d 122, 132.) In *In re Yurko* (1974) 10 Cal.3d 857 (*Yurko*), our Supreme Court held admission of a prior conviction requires the same waivers as a guilty plea. (*Id.* at p. 863.) Our Supreme Court also held in *Yurko*, “ ‘as a judicially declared rule of criminal procedure’ that an accused, before admitting a prior conviction allegation, must be advised of the precise increase in the prison term that might be imposed, the effect on parole eligibility, and the possibility of being adjudged a habitual criminal.’ ” (*People v. Cross* (2015) 61 Cal.4th 164, 170-171, quoting *Yurko*, *supra*, at p. 864.)

“*Yurko* error is not reversible per se.” (*People v. Cross, supra*, 61 Cal.4th at p. 171.) “[I]f the transcript does not reveal complete advisements and waivers, the reviewing court must examine the record of ‘the entire proceeding’ to assess whether the defendant’s admission of the prior conviction was intelligent and voluntary in light of the totality of circumstances.” (*People v. Mosby* (2004) 33 Cal.4th 353, 361 (*Mosby*).) “The focus is not on whether a prior would have been found true, but on whether the defendant knew of his constitutional rights.” (*People v. Stills* (1994) 29 Cal.App.4th 1766, 1770.)

As set forth above, the trial court committed *Yurko* error by failing to advise defendant of his rights to remain silent and to confront witnesses. The People argue the error was harmless.

In *Mosby, supra*, 33 Cal.4th 353, our Supreme Court held that the court of appeal did not err in concluding, under the totality of the circumstances, that the “defendant voluntarily and intelligently admitted his prior conviction despite being advised of and having waived only his right to jury trial.” (*Id.* at p. 365.) The Supreme Court noted that the “defendant, who was represented by counsel, had *just* undergone a jury trial at which he did not testify, although his codefendant did. Thus, he not only would have known of, but had just exercised, his right to remain silent at trial And, because he had, through counsel, confronted witnesses at that immediately concluded trial, he would have understood that at a trial he had the right of confrontation.” (*Id.* at p. 364.) Defendant contends *Mosby* is distinguishable because he admitted the priors before hearing the jury’s verdict, he had questions for the court, and was not told his admissions would subject him to a 16-year sentence. We disagree. For these purposes, there is no meaningful difference between admitting priors just before the jury’s verdict was read instead of just after. The critical point is defendant had just undergone a jury trial at which he exercised his right to remain silent and confronted witnesses through his counsel. (See *ibid.*) In addition, “ ‘a defendant’s prior experience with the criminal justice system’ is . . . ‘relevant to the question [of] whether he knowingly waived

constitutional rights.’ ” (*Ibid.*) At sentencing, defendant stated that he “should [have] addressed the jury.” The trial court responded, “You’re very familiar with the criminal justice system. And I know you understood clearly the upsides and downsides to testifying, and you made that decision on your own. And so that’s something you have to live with at this point in time.” The trial court also added, “you have one of the lengthier records I’ve seen in a very, very long time. You’ve basically not spent more than a year out of custody since 1990.” We disagree with the suggestion that the trial court did not adequately advise defendant of the consequences of admitting his priors. The trial court explained how many years each admission would add to his sentence. (See *Yurko, supra*, 10 Cal.3d at p. 864 [defendant must be advised of “the precise increase in the term or terms which might be imposed”].) As for defendant’s questions, the record reflects they were resolved and they did not relate to his constitutional rights. To the extent they related to the punishment for priors that had been reduced to misdemeanors, as we discuss next, those enhancements will be stricken. The totality of the circumstances indicate defendant’s admissions were made intelligently and voluntarily.

E. Proposition 47

Defendant argues, and the People concede, the two prior prison term enhancements (§ 667.5, subd. (b)) based on case Nos. 02F05477 and 13F07250 must be stricken because the underlying felony convictions, for violations of sections 496, subdivision (a), and 666, respectively, attached to the enhancements had already been reduced to misdemeanors under Proposition 47 by the time defendant admitted them. We accept the People’s concession. (*People v. Buycks* (2018) 5 Cal.5th 857, 888-890.)

F. Senate Bill No. 1393

At the time of sentencing, the imposition of the section 667, subdivision (a)(1) five-year prior serious felony enhancement was mandatory, and the court had no discretion to strike it. (Former § 1385, subd. (b) [“This section does not authorize a judge to strike any prior conviction of a serious felony for purposes of enhancement of a

sentence under Section 667”].) On September 30, 2018, the Governor signed Senate Bill No. 1393 (2017-2018 Reg. Sess.), which amended this rule. Effective January 1, 2019, a court may exercise its discretion under section 1385 to strike or dismiss a prior serious felony conviction for sentencing purposes. (Stats. 2018, ch. 1013, §§ 1-2.) The People concede this change applies retroactively to these proceedings, and that remand is required. We again accept the People’s concession. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 972-973.)

III. DISPOSITION

The judgment of conviction is affirmed. The sentence is vacated and the cause is remanded to the trial court for the purpose of allowing the court to exercise its discretion whether to strike or dismiss the enhancement under section 667, subdivision (a)(1). Upon doing so, the court shall resentence defendant accordingly. At resentencing, the two prior prison term enhancements previously imposed as described by this opinion shall not be imposed.

/S/

RENNER, J.

We concur:

/S/

RAYE, P. J.

/S/

MAURO, J.